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IN THE

Supreme Court of the United States

October Term, 1962.

No. **465** Miscellaneous.

PRISCILLA ALDEN BEACH, a/k/a PRISCILLA A. HICKEY, Widow,

Plaintiff,

vs.

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (successor to Rome Trust Company) and JOHNSON D. McMAHON,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

Brief for Respondent, Oneida National Bank and Trust Company of Central New York in Opposition.

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1962

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Priscilla Alden Beach, a/k/a Priscilla A. Hickey, Widow,

Plaintiff

vs.

Oneida National Bank and Trust Company of Central New York (Successor to Rome Trust Company) and Johnson D. McMahon,

Defendants.

Brief for Respondent Oneida National Bank and Trust Company of Central New York in Oppo ition to Petition for Writ of Certiorari.

Statement.

There are so many inaccuracies and omissions in the petition, including that portion thereof entitled "Procedural Facts" at pages 10 through 14, that it is deemed necessary to correct some of them. For the sake of brevity, the page number of the petition at which an inaccurate statement appears is set forth at the beginning of a paragraph herein.

Page 3. The statement that plaintiff's brother, as executor of their mother's estate, "did absolutely nothing prior to his death on June 30, 1953" is false. For ex-

ample, prior to his death, both state and federal transfer tax returns were filed, and the instruments necessary to effect stock transfers were executed.

Page 4. The statement that the Trial Judges in the northern district "deliberately prevented plaintiff from securing a jury trial of this case" is false, and so is the statement that the case was "on the ready calendar from March, 1960 to June, 1961."

Page 5. The statement that Judge Brennan "would not allow plaintiff to try the case under the original complaint and ordered plaintiff to amend the complaint" and "to omit all reference to fraud, with a charge merely of negligence" is absolutely false.

Page 11. The statement that Robert Beach, "without any appointment on notice or otherwise as to the plaintiff * * * cited plaintiff by constructive service in California" to appear in the Surrogate's Court proceeding, is false. The petitioner in that proceeding was not Robert Beach, but Robert Beach, administrator with the will annexed of the estate of Samuel H. Beach, the deceased executor of the estate of Carrie A. Beach, accounting for the acts of the deceased executor. Plaintiff was not entitled to notice of the appointment of the administrator with the will annexed because she was not interested in the estate of her brother, Samuel H. Beach. Plaintiff was not cited by constructive service; she was served personally with a citation, and the record on appeal, prepared by plaintiff's attorney, Robert L. Collins, for use in connection with an appeal in the Appellate Division, Fourth Department of the Supreme Court of the State of New York, so shows.

Page 12. The statement that discovery proceedings "were then held in October, 1959 to January, 1960," is

inaccurate. Plaintiff's attorney was still serving interrogatories, supplementary interrogatories and demands for admission in February, March and April, 1960.

Page 12. The statement that "at a pre-trial hearing in May 1960 defendants requested a stay order from Judge Foley unless plaintiff agreed to drop" opposition to State Court proceedings is inaccurate for two reasons. There was no pre-trial hearing in May, 1960; it was at calendar call at the opening of that term that defendants requested that the trial be held until plaintiff's four appeals in the Surrogate's Court proceeding, then pending in the Appellate Division of the Supreme Court of the State of New York, were decided. The reason for the request was that, in the original complaint, there were allegations of misappropriation of assets by defendants. The Circuit Court of Appeals had held that Surrogate's Court had jurisdiction of the accounting phase of the litigation, and defendants claimed that the decision in the Appellate Division in the accounting proceeding would establish of what assets the estate of Carrie A. Beach consisted. In his opinion of June 1, 1960, Judge Foley said in part: "The state appeals have been taken by the attorneys for the plaintiff, and the choice to expedite these appeals is in their hands, and they should inform the Appellate Division, Fourth Department, of the need for speedy decision in order to try the issues we have in this District Court." On September 13, 1960, plaintiff's attorney stipulated in writing that the trial in Federal Court be held until plaintiff's appeals in the Appellate Division were decided, and, instead of expediting the appeals, plaintiff's attorney delayed so that the appeals were not argued until October 19, 1960. The decision, adverse to plaintiff, was rendered on December 9, 1960.

Plaintiff did not notice the case for the January, 1961 term.

Plaintiff noticed the case for the March, 1961 term, and at a conference following calendar call on March 7, 1961, plaintiff's trial counsel told Judge Foley that plaintiff felt that both Judge Foley and Judge Brennan were prejudiced against her and that she wanted an outside Judge.

Page 13. The statement, in substance, that plaintiff's counsel was ordered to appear for trial on April 10, 1961, that defendants refused to proceed, and that Judge Brennan ordered plaintiff to amend the complaint is absolutely false. The facts are that a jury was drawn on April 4, 1961, after which a lengthy conference was held by Judge Brennan with counsel to try to clarify the issues. At one point, near the end of the conference, it was agreed that the trial would proceed on the basis of the conspiracy portion of the complaint alone, subject to plaintiff's approval. One of plaintiff's attorneys left the conference to talk with plaintiff and returned to say that she would not go to trial on that basis. Thus it was plaintiff, and not defendants, who refused to go to trial.

The following is from the record taken by the court reporter, Mr. Manheim being plaintiff's trial counsel:

> "The Court: Let the record show that we have been in conference, the parties and the Court, most of the time since early morning or since the jury was drawn. It is now four o'clock.
>
> "I think that the parties have agreed that the pleadings should be amended and I am going to let them make their own statement. I think also that this jury be discharged from any further consideration of the case.
>
> "All right, gentlemen, put on the record what you wish to do.
>
> "Mr. Manheim: The plaintiff is to submit an amended pleading properly identifying the parties to the l. gation and properly conferring jurisdiction upon the Court, and also setting forth its

cause of action necessary to accomplish the construction of the will. And also to continue an action against the Rome Trust Company and the defendant McMahon for mismanagement of trust funds, fraud in the management of trust funds and conspiracy between the defendants in the management of trust funds, all of which was intended to and did deprive the plaintiff of a fair and adequate return of the proceeds of the trust established for her benefit.

"The Court: Gentlemen I don't believe you are bound by what Mr. Manheim said. You are to receive an amended complaint setting up a cause of action and I urge you when you serve it to separately state the number of causes of action, to make them as concise as you can, as to the theory or basis of your right to recover. All right. That is to be done within ten days.

"Mr. Manheim: Yes.

"The Court: All right. Then I assume the defendants will answer, and if I understand it right, it is agreed that the Court may order the case on the May Term of this Court, to be held commencing the first part of May.

"Mr. Austin: That is agreeable.

"The Court: Even though the time to file a note of issue has expired by the time you answer.

"Mr. Manheim: May the plaintiff express, and I believe that the defendants will join in with the plaintiff as expressing a desire, for the record, that within the realm of availability Judge Brennan will hear the case.

"The Court: All right. And I want each of you to send to me, when you serve your amended complaint and when you gentlemen serve your answers, mail copies to me at my office in Utica, and I may call a pre-trial hearing because I am not going to let this next case get into the condition this is in."

Page 14. The statement that "Plaintiff's counsel reluctantly complied with this ruling on a promise the Judge

might hear the case in June 1961" is false; there was no ruling, there was no promise to hear the case in June, and the amended complaint wasn't served until April 27.

On May 1, 1961, after receiving a copy of the amended complaint, Judge Brennan wrote counsel, in part:

> "I would like to try this case at the Term which opens at Albany tomorrow, May 2, but I can see that there must be some preliminary work done before the case is reached. * * * I dislike to officially order a pre-trial conference because counsel for the plaintiff resides at a considerable distance from either Utica or Syracuse but, on the other hand, time and expense might be saved by such action. I would be glad to have your reaction to this letter immediately."

On May 6, 1961, plaintiff's attorney replied to Judge Brennan, in part:

> "In reply to your letter of May 1, 1961 with reference to the above cause the plaintiff is unable to make any commitment as to policy until the defendants have served and filed their verified answers."

On May 10, 1961, Judge Brennan wrote counsel, in part:

> "I would like to try this case at Albany as soon as possible and unless some of the problems are disposed of prior to the trial date, I am fearful that we will encounter the same situation that we met at Syracuse. For the above reason, I have prepared an order for a pre-trial conference which is enclosed."

The order set May 22, 1961, as the date for the pre-trial conference.

On the morning of May 22, a telegram was received from plaintiff's attorney requesting that the conference be postponed until May 29. Judge Brennan advised that

the date of May 29 was not available and he adjourned the matter until June 1. In so adjourning it, he wrote counsel on May 23, in part:

> "This matter should not be further delayed: in fact, it cannot be further delayed if there is any hope of trying the case in June. Please make arrangements to be present on the adjourned date mentioned above."

On May 30, 1961, defendants' attorneys received a telegram from plaintiff to the effect that the pre-trial hearing "must be postponed because as of this date I have been unable to secure local trial counsel. In addition I have a motion pending in U. S. Court of Appeal which must be decided before I can make any commitments."

On May 31, 1961, defendants' attorneys received notice of motion from plaintiff's attorney, returnable in the Circuit Court of Appeals for the Second Circuit on June 5, 1961, for the assignment of an outside Judge. The motion was denied on June 7, 1961, and the Court suggested "that the district court set the case for early trial at the next term of court in September 1961."

On June 1, 1961, Judge Brennan wrote counsel in part:

> "By reason of telegrams from Mrs. Beach and motion papers submitted by Mr. Collins, which I received this morning, I have adjourned the pre-trial hearing in the above matter, the adjourned date to be fixed by me with three days notice to counsel after the Circuit Court has decided the pending motion. * * * I do not want any misunderstanding as to the trial of the case at the present term of Court. The case can be reached and tried at any time within the next couple of weeks. * * * If I am to preside at the trial, I think I can arrange for the disposition thereof very promptly after Mr. Collins notifies me that he is ready to proceed."

On June 8, 1961, after receiving the decision of the Circuit Court denying plaintiff's motion for assignment of an outside Judge, Judge Brennan wrote counsel in part:

> "I request Mr. Collins to advise me as soon as possible when it will be agreeable to him to hold the pretrial conference as per the order already issued. I also request Mr. Collins to advise as soon as possible as to whether or not the opening day of the September Term is an agreeable date for the trial of this action."

On June 21, 1961, Mr. Collins wrote Judge Brennan in part:

> "* * * Plaintiff consents to trial of the above cause before court and jury at the September 1961 Term upon the following conditions. 'First: There be no further pre-trial hearings and defendants be compelled on a day certain to appear ready for trial * * *."

On June 27, 1961, Judge Brennan wrote counsel to the effect that he would like very much to have the pre-trial hearing at least by the middle of July, that if no date be agreed upon by Mr. Collins and other counsel by July 10, the Court would fix the date himself, and that he expected to hear from Mr. Collins by July 10.

On July 8, Mr. Collins wrote Judge Brennan that the earliest available date for the pre-trial conference would be August 10, 1961.

On July 11, 1961, Judge Brennan wrote counsel setting August 11 as the new date.

On August 2, 1961, Mr. Collins wrote Judge Brennan in part:

> "Hence, the tentative pre-trial hearing of August 11, 1961, will have to be postponed indefinitely."

On August 7, 1961, Judge Brennan wrote counsel that the order for a pre-trial hearing on August 11, 1961, would stand.

On August 10, 1961, Mr. Collins wired Judge Brennan requesting an adjournment to September 6.

On August 11, 1961, Judge Brennan wrote Mr. Collins that over the objection of counsel for the defendants, he had adjourned the pre-trial hearing until September 6.

On August 23, 1961, counsel for the defendant trustee notified plaintiff's attorney that at the opening of the term on September 12, 1961, the Court would be requested to direct that the trial of the action commence on September 18, 1961.

On September 2, 1961, plaintiff's attorney served a notice of motion returnable in District Court on September 11 for an order compelling the defendant trustee to advance plaintiff the sum of $2,000 for trial expenses.

On September 4, 1961, plaintiff's attorney wired Judge Brennan requesting another adjournment of the pre-trial hearing, and on the following day Judge Brennan adjourned it until September 11.

On September 9, 1961, plaintiff's attorney wired Judge Brennan that he wanted to submit the counsel fee motion for decision and that he would not be ready for trial until resources of trial counsel were available.

Plaintiff's attorney did not appear for the pre-trial hearing on September 11, and defendants' attorneys moved for the dismissal of the action because of his failure to so appear. The motion was denied and the pre-trial hearing date was adjourned to September 22.

Plaintiff's attorney did not appear on September 22. Defendants' attorneys again moved for the dismissal of the action because of such non-appearance, and on that date Judge Brennan issued an order reading in part:

> "ORDERED that this action be and the same is hereby dismissed unless plaintiff's counsel appears at a pretrial hearing in this action to be held at the Federal Court House in the City of Syracuse on Monday, October 2, 1961 at 10 A. M. and that plaintiff and her counsel appear ready for the trial of this action on October 9, 1961 at 10 A. M. at the Term now in session at Syracuse."

On October 2, 1961, no appearance was made by plaintiff's attorney as directed in the order of September 22, and an order of dismissal was granted orally with directions to present a formal order of dismissal. About half an hour later an attorney appeared in court and advised Judge Brennan that he did not represent the plaintiff, had no power to make commitments and was in the process of examining the records to ascertain whether or not he would appear as plaintiff's counsel in the litigation. The Court's signature to the proposed dismissal order was then withheld pending the attorney's decision. On October 6, the attorney decided not to appear in the action.

On October 8, Judge Brennan received a telegram from plaintiff and her attorney, Mr. Robert L. Collins, requesting him to give them "a date for the pre-trial hearing you have requested," and stating that their preference was November 6 but that they would agree to any reasonable date.

On October 11, Judge Brennan set November 6, 1961, as the pre-trial hearing date.

Despite the long and patient efforts of Judge Brennan to get plaintiff to try her law suit, as indicated in the brief summary above, there is the statement at page 17 of the petition, in substance, that the Judges in the Northern District refused for two and a half years to allow the plaintiff a trial on any basis.

Finally, on November 6, 1961, almost six months after the date first set for the pre-trial hearing, Mr. Robert L. Collins did appear for such hearing. He was accompanied by plaintiff and her trial counsel, each of whom was present during the entire hearing, and at that hearing Mr. Collins, in his own language, at long last told the Court what he claimed the issue to be in the first alleged cause of action of the amended complaint. That very language is embodied in Pre-trial Order No. 1, dated November 9, 1961, which isn't mentioned in the petition, of course, and which reads as follows:

> "The issue of the first cause of action is defined as a conspiracy to defraud plaintiff of her life estate as created by the last Will of Carrie A. Beach, deceased."

The statement at page 14 that Judge Brennan "compelled plaintiff to try the second cause of action pertaining to her rights under the stock in November, 1961, and would not allow a trial of the Second Cause until January 10, 1962," is both inaccurate and amusing, inaccurate in that the order of trial of the issues and the dates of beginning of the trials were agreed to by counsel, including Mr. Robert L. Collins, in the presence of plaintiff herself at the pre-trial conference on November 6, 1962, and amusing in that such statement is an admission that once Mr. Collins did attend the pre-trial hearing, adjourned so many times at his request, but never at the request of the defendants, he had a trial of the non-jury phase of the litigation three days after the date of the conference and a trial of the jury phase starting on the opening day of the very next term of court.

Argument.

There can be no quarrel with the quotation from the decision in the Standard Machinery Company case cited at page two of the petition; of course damages may be assessed in favor of a beneficiary against a defaulting trustee. However, the quotation in the petition doesn't go far enough, for the decision from which the quotation is taken also reads that "In this state of the proof the judgment against Moyer (the trustee) cannot stand." The decision in the case at bar does not conflict with the holding in the Standard Machinery Company case. In the instant case, Judge Brennan dismissed for lack of proof. In affirming, the Circuit Court said that "plaintiff failed to adduce evidence sufficient to warrant submission to the jury of her claim for breach of trust, fraud, and conspiracy in the administration of the trust." There was no holding that, in an instance in which a cause of action is proven, damages may not be assessed; there was a holding of lack of proof, and there was just such a holding in the Standard Machinery Company case.

The propriety of such a decision by Judge Brennan, and by the Circuit Court, in affirmance, is illustrated by the fact, for example, that while it is alleged in the amended complaint that "from August, 1952, and subsequent thereto, defendant, Johnson D. McMahon, a director of Rome Trust Company, conspired, combined and confederated with the officers and directors of Rome Trust Company to defraud plaintiff of her interest in the assets of the family fortune and of her one-half in for mother's estate. That in furtherance of the conspiracy defendant, Johnson D. McMahon prevailed upon Carrie A. Beach to deviate from terms of will of Samuel H. Beach, Sr., and to name Rome Trust Company as trustee under her will. That pursuant to the said conspiracy, loans and

lines of credit were given by Rome Trust Company to Beach Lumber Company and to Johnson D. McMahon," yet,

1. the will of Carrie A. Beach was executed on February 3, 1950, some thirty months before the alleged conspiracy to prevail upon her to deviate from the terms of her husband's will is alleged to have begun, and

2. proof at the trial established that Mr. McMahon had a line of credit with Rome Trust Company starting on March 10, 1936, some sixteen years before the alleged conspiracy is supposed to have begun.

Taking apart the question at page seven of the petition, plaintiff's reasoning appears to be:

1. In 1959, the Circuit Court of Appeals for the Second Circuit held that the complaint, then before it, sufficiently stated a cause of action for fraud, so, therefore

2. that same Court does not have the power to affirm the action of a Trial Judge in dismissing the cause of action, for lack of proof, at the conclusion of the presentation of plaintiff's case during trial

3. because plaintiff's complaint never alleged any facts except those showing breach of trust and constructive fraud.

In the first place, as a reading of Judge Lumbard's opinion in the appendix to the petition (p. 2a) shows very clearly, the only question decided by the Circuit Court in 1959, was one of jurisdiction of subject matter, i. e., whether or not Judge Foley should have declined jurisdiction as to each of the five alleged causes of action in that particular complaint.

In the second place, the complaint which was before the Circuit Court in 1959 was not the pleading on which plaintiff went to trial; the litigation was tried on the amended complaint served in April, 1961.

In the third place, the statement at page eight of the petition that "plaintiff's complaint never alleged any facts except those showing breach of trust and constructive fraud," and the statement at page 15 that "plaintiff's complaint had always been based on constructive fraud theory and had been made law of case" are inaccurate. Again, the only pleading to be considered is the amended complaint. As stated above, plaintiff's attorney, Mr. Robert L. Collins, at the pre-trial conference on November 6, 1961, told the Court, when asked to define the issue of the first cause of action in the amended complaint, that such issue is "a conspiracy to defraud plaintiff of her life estate as created by the last Will of Carrie A. Beach, deceased." That is the very language Judge Brennan embodied in the Pre-trial Order, and that did become the law of the case. In addition, the first alleged cause of action in the amended complaint contains such language as "conspired, combined and confederated * * * to defraud * * * in furtherance of the conspiracy * * * pursuant to the said conspiracy * * * to facilitate the execution of the conspiracy to defraud * * * in furtherance of the conspiracy to defraud."

CONCLUSION.

The petition discloses no reason whatsoever why the writ should be granted. The application should be denied.

Respectfully submitted,

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(Member of Bar of Supreme Court of the United States.)

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